

STATE OF CALIFORNIA  
ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of:	)	Docket No. 01-AFC-17
	)	
Application For Certification of the	)	COMMISSION STAFF'S
Inland Empire Energy Center, LLC	)	REPLY BRIEF
	)	
_____	)	

The Energy Commission Staff ("Staff") offers its Reply Brief in response to the Applicant's Opening Brief filed on August 22, 2003.

**I. The Applicant Has Failed to Identify NOx Offsets as Required by the Warren-Alquist Act.**

The Applicant mischaracterizes the Legislature's intention in amending Public Resources Code Section 25523. No evidence has been offered in support of the characterizations. Nor is it necessary to look beyond the plain words of the statute.

The Applicant's interpretation of Subsection 25523(d)(2) is built upon a manufactured conflict between distinct provisions in that Subsection. The Staff's interpretation of the requirement for certification that offsets "will be obtained" within the time required by air district rules as necessitating an option to purchase offsets is said to conflict with the requirement that the Commission require as a condition of certification that an applicant obtain the necessary offsets by the time required under air district rules, which is asserted to define when offsets must be "obtained."

Staff believes that the purchase of an option on a RECLAIM trading credit (RTC) is one way to satisfy Section 25523's requirement to identify offsets "prior to the licensing of the project by the commission." An option is not, as the Applicant implies, the equivalent of a purchase of an RTC. An option simply gives that Applicant the legally enforceable right to purchase the RTC at a later time if it chooses to do so. It is only when the option is exercised that the Applicant will come into possession of the RTC. The option does, however, make it unlikely that the RTC owner will sell the RTC to someone else or keep it for the owner's own use, making possible a certification that the RTC can and will be obtained by the Applicant by the time required under the Air District's rules.

A general rule of statutory construction directs that provisions of the law be read to avoid conflicts rather than to create them. Here, the alleged conflicting provisions of the subsection can be quite reasonably read to address different aspects of the review of a

project. First, a prerequisite for approval of an application is stated—a certification that sufficient offsets have been identified as of the time of certification and will be obtained within the time specified by the air district rules. Second, the Commission is instructed that any approval of an application must include a condition that the applicant must follow through and obtain the offsets in the required time.

The Applicant suggests that the Staff, not having objected to the identification of 90 percent of the required RTCs in the El Segundo siting case (00-AFC-14)<sup>1</sup> is precluded from objecting to the identification of only 10 percent of the required RTCs in this case. Those deficiencies are fundamentally different in degree, however. To equate the two and argue that a willingness to approve a small deficiency requires approval of a very large deficiency defies logic and ignores the statutory requirement.

In any event, the premise underlying the Applicant's argument is false. The El Segundo applicant had in fact identified more than 100 percent of the necessary RTCs prior to the release of the original staff assessment in that case. The confusion<sup>2</sup> appears to result because the El Segundo Final Staff Assessment, in addition to examining whether sufficient RTCs were identified on an annual basis, compared the maximum possible daily NOx emissions with the daily average amount of RTCs. On an annual basis, the El Segundo applicant was found to have more than enough RTCs—166 tons to satisfy an offset obligation of 153 tons.<sup>3</sup> On a daily basis, however the applicant was short by 248 pounds—908 pounds to satisfy a potential 1,155 pound offset obligation.<sup>4</sup> The Air District's rules require the quarterly, not daily, reconciliation of emissions and RTCs. SCAQMD Rule 2004(b). Therefore the daily comparison is not the measure of whether "complete emissions offsets for the proposed facility have been identified" as required under Subsection 25523(d)(2). The El Segundo Final Staff Assessment, at page 4.1-47, specifically found that "[t]he ESPR has sufficient RECLAIM trading credits (RTCs) to mitigate the facilities NOx emissions on an annual basis."

In this case, the Applicant's proposal to accept a condition that it will identify and obtain RTC options prior to beginning construction does not satisfy the requirements of the Warren-Alquist Act, which requires, in effect, that those events take place before the Energy Commission approves the project.

## **II. The Applicant Has Failed to Identify PM<sub>10</sub> and SO<sub>x</sub> Offsets as Required by the Warren-Alquist Act.**

In the portion of its Opening Brief addressing proposed Condition COM-15, the Applicant continues to suggest that it has not decided whether to use the Air District's Priority Reserve for PM<sub>10</sub> and SO<sub>x</sub> offsets. Applicant's Opening Brief, p. 33. That assertion calls into question whether the Warren-Alquist Act "identification" requirement

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<sup>1</sup> Staff requests that the Committee take official notice of the record in that proceeding, specifically of the Staff Assessment dated September 2002.

<sup>2</sup> Reflected, among other places, in Mr. Birdsall's supplemental testimony, Exhibit 68, p. 5.

<sup>3</sup> El Segundo Final Staff Assessment, September 2002, Air Quality Table 21, p. 4.1-51.

<sup>4</sup> Id., Air Quality Table 22, p. 4.1-52. (The apparent mathematical error (1,155 – 908 = 247) is in the FSA. We assume it is due to rounding.)

is satisfied for PM<sub>10</sub> and SOx in addition to Staff's previously expressed concerns regarding NOx RTCs.

The South Coast Air Quality Management District's (SCAQMD) Final Determination of Compliance assumes and contains conditions requiring the use of the Priority Reserve for PM<sub>10</sub> and SOx offsets, as does Staff's proposed condition AQ-SC9. No allowance has been made for the Applicant to choose some other form of offsets.

Under SCAQMD rules, PM<sub>10</sub> and SOx offsets must be obtained prior to the issuance of the Authority to Construct. At the time of certification by the Energy Commission, Section 25523(d)(2) requires a certification that the offsets are both identified and that they "will be obtained by the applicant within the time required by the district's rules." If the Applicant has not yet decided whether to use the Priority Reserve, neither certification can be made. The "identification" offered by the Applicant is speculative. No alternative offsets have been identified for use if the Priority Reserve is not used. Similarly, one cannot find that the Priority Reserve credits will be obtained if the Applicant is unsure that it will use them.

### **III. Staff Is Willing to Agree to Modified Diesel Mitigation Provisions.**

The Applicant proposes the use of the construction diesel conditions contained in Condition AQ-SC3(o) of the recently adopted East Altamont Energy Center Energy Commission Decision (01-AFC-4) dated August 20, 2003. Staff considers those conditions to be no less protective of the environment than Staff's version of AQ-SC3(o) and, therefore, agrees to the substitution of the East Altamont formulation for Staff's proposed language.

### **IV. Condition AQ-SC5 Is Appropriate and Should Be Applied to This Project**

The speculative critiques of the proposed dust monitoring protocol (Condition AQ-SC5) do not support the deletion of that requirement.

At page 16 of its Opening Brief, the Applicant suggests that controlling visible dust should be sufficient to control PM-10 from construction activities. This is simply not so. As Mr. Birdsell testified:

The problem is that the particulate matter that's inhalable is not necessarily visible. And we're recommending the monitoring devices to track the fine particulate matter, the PM-10, that is inhalable but not necessarily visible. HT, p. 218, Ins. 8-13.

The Applicant's argument assumes that only "visible" dust is of concern. Staff's point, however, is that the human eye is not a sufficiently sensitive instrument for this purpose. Levels of dust and particulate that should be of concern wouldn't be visible. At the point when dust does become visible, it has already significantly exceeded the level of concern.

The presence of off-site dust generators, including the asphalt plant to the north of the project site, can be accounted for in the monitoring protocol. Similarly, Applicant's concern about worker safety should the monitors be placed inward of the project fence line are at best speculative at this point and can be addressed in a properly designed program.

After admitting that the Air District's construction dust monitoring requirement does not apply to this project, the Applicant then argues that the Staff's monitoring proposal is inappropriate because it would use a different methodology (instantaneous measurement vs. 24-hour averaging). Applicant's Opening Brief, p. 13. As the Air District rule is inapplicable, there would be no conflict that would prevent the use of monitors as proposed by Staff.<sup>5</sup>

The Applicant's criticisms of Condition AQ-SC5 are at this point theoretical and speculative. They ignore the potential for significant health impacts on the neighboring residents who live in an area already in exceedance of state and federal standards and to which the Applicant's construction dust and particulate matter will be added.

**V. Staff's Proposed Construction Milestones Condition (COM-15) is Appropriate to Assure Compliance With the Requirements of the Air District's Priority Reserve Program and Timely Construction of the Project.**

As we described in our Post Hearing Brief, the Applicant must pay the Priority Reserve fees to the Air District before an Authority to Construct will be issued. Staff's Post Hearing Brief, p. 5. Those fees are significant--\$12.6 million for PM<sub>10</sub> and \$720,000 for SOx. Exhibit 67, p. 5.1-33-34. The required RTCs were estimated in the Final Staff Assessment to cost an additional \$2 million. Id., p. 5.1-32. Upon receipt of the Energy Commission's approval of this project, the Applicant must work diligently toward obtaining the ATC. Requiring a milestone plan within 60 days of the Energy Commission's approval will help assure that a diligent effort is made. Not only is uncertainty about whether to use the Priority Reserve a poor justification for postponing the submission of milestones, as we describe above, it calls into further question whether this project is in a position to be approved at this time.

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<sup>5</sup> Applicant's arguments appear to be premised on an assumption that the Energy Commission should not go beyond the rules established by the Air District, specifically Rule 403 regarding fugitive dust. In this specific case Staff considers the measures required by Rule 403 to be inadequate to mitigate the construction dust impacts of the project and proposes additional measures such as the use of diesel soot filters (AQ-SC4(o)) and monitoring (AQ-SC5). Those measures are necessary to mitigate the impacts to below-significant levels.

## **VI. Conclusion.**

Unless the Applicant 1) identifies sufficient first year NOx RTCs and provides evidence of options or other legally binding commitments that will assure that it will be able to obtain those credits and 2) affirms its intention to use the Priority Reserve for PM<sub>10</sub> and SOx offsets, Staff cannot recommend that the Application for Certification be approved. If the required proof of sufficient RTCs and confirmation of intention to use the Priority Reserve is made, Staff recommends approval subject to the Conditions of Certification proposed by Staff, modified as described above and in our Opening Brief.

DATED: September 3, 2003

Respectfully submitted,

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